THE HONOURABLE SRI JUSTICE

B.SUDERSHAN REDDY

AND

THE HONOURABLE SRI JUSTICE

GHULAM MOHAMMED

WRIT APPEAL No. 321 of 2004.

Judgment: (Per Hon'ble Sri Justice B.Sudershan Reddy)

The core question that falls for our consideration is as to whether a writ petition under Article 226 of the Constitution of India is maintainable to resolve the disputes arising out of concluded commercial contractual obligations between a citizen and the State or its instrumentalities even in cases where the contract itself provides for the Forum to resolve the disputes.

Shorn of all the details, the appellant-U.P. State Transport Corporation invited tenders in September, 1997 for printing and supply of 72,00,000 blank ticket books and 1,05,300 way bills pads for its use. That in response to the invitation, the respondent/writ petitioner vide dated 20-9-1997 offered to supply the said quantity of blank ticket books and way bills and furnished two demand drafts issued by the Canara Bank, Abids Branch, Hyderabad for a sum of Rs.98,000/- and Rs.28,080/- towards the EMD for blank ticket books and way bills respectively. On 29-9-1997 the respondent/writ petitioner was called for negotiations during which he had agreed to reduce the quoted rate. The appellant-Corporation accepted the revised tenders of the respondent/writ petitioner. On 5-11-1997 the appellant-Corporation placed purchase order for supply of 72 lakhs of blank ticket books to be supplied over a period of one year. On the same day, a separate purchase order was also issued for the supply of 35,100 way bill books out of a total quantity of 1,05,300 books. Some controversy had arisen between the parties in the matter of execution of the

contract. That an enquiry is said to have been ordered by the Government of Uttar Pradesh into the matter award of this contract to the respondent/writ petitioner. But the fact remains that several quantities of supplies came to be made by the respondent/writ petitioner under the contract. There is a dispute as to the quantity of books supplied by the respondent/writ petitioner as is evident from the averments made in the counter-affidavit.

That on 13-2-1998 the appellant herein informed the respondent/writ petitioner asking it to stop the printing of
8 lakhs blank ticket books and 5000 way bill books representing the balance supplies to be made under purchase order Nos. 275 and 276 dated 5-11-1997. The respondent/ writ petitioner, on 16-2-1998 while adverting to the communication, raised dispute and pointed out that it had already printed the balance 8 lakhs blank ticket books and those were ready for dispatch. The writ petitioner addressed a letter dated 20-2-1998 to the appellant stating that an amount of Rs.1,30,54,798/- is due from it. The writ petitioner specifically claimed an amount of Rs.17,12,000/- towards the 8 lakhs blank ticket books which were printed and made ready for dispatch. Some other disputes were also raised requesting the appellant to refund the earnest money deposits in respect of 1996-97 and 1997-98 contract.

That on 22-4-1998 the writ petitioner addressed letter to the appellant-Corporation requesting it to arrange for payment of Rs.1,13,42,798/- due to it including the outstanding dues in respect of 1997-98 contract. The appellant-Corporation on 1-5-1998 replied that the enquiry regarding the award of contract of printing of 2 lakhs blank ticket books was in progress. In the meanwhile, some writ petitions were filed challenging the action of the appellant-Corporation with which we are not concerned for the present in this case. The appellant-Corporation vide its letter dated 19-5-1999 intimated the respondent/writ petitioner that the enquiry regarding blank ticket books and way bills will be conducted on 23-6-1999 and requested it to be present on that day. The Managing Director of the Company could not attend the enquiry due to his ill-health and requested for time. The matter was adjourned to 27-9-1999. Thereafter the appellant-Corporation vide its letter 20-9-2999 informed the

petitioner stating that from out of 8 lakhs blank ticket books supplied during November and December it has taken out 80 random samples from out of 10,000 blank ticket books and that out of 80, only 2 were up to the mark and the rest of 78 samples were found to be not in conformity with the measurements mentioned in the purchase order. The writ petitioner was required to be present before the purchase Committee on
5-10-1999. As usual, the respondent/writ petitioner sent some telegram alleging that the Managing Director of the Company was seriously ill and the counsel accordingly requested for an adjournment in the matter. The matter was adjourned to be taken up on 26-10-1999. Some representation was made through the counsel for the respondent/writ petitioner. The matter underwent several adjournments.

The respondent/writ petitioner filed O.S.No. 572 of 2001, O.S.No. 8 of 2001 and O.S.No. 66 of 2001 against the appellant-Corporation for recovery of various amounts with which we are not concerned for the present in this proceedings.

The case of the respondent/writ petitioner is that immediately after receiving the suit notices, as a counter blast to the suit filed by it, the appellant-Corporation passed order dated 9-4-2000 purporting to impose a penalty of Rs.1,66,92,000/- by invoking clause 11 of the purchase order dated 5-11-1997. It is that order which is challenged in the writ petitioner *inter alia* contending that the order imposing penalty is illegal, unjust and *mala fide*.

It was contended that no communication was addressed to the writ petitioner at any time calling upon it to show cause why the penalty much less an horrendous penalty of Rs.1,66,92,000/- should not be levied. The order is a *malafide* one. The appellant-Corporation utilised the books supplied more than three years ago without any complaint. Number of issues were raised challenging that proceedings.

In the counter-affidavit it is *inter alia* stated that penalty was levied invoking

clause 11 of the purchase order for the violation of the terms and condition of the contract. The books supplied by the respondent/writ petitioner were not as per the specifications. The Corporation got the entire disputed 2 lakhs blank ticket books checked by its Officers and Accountants and found 404 books out of the lot supplied by the respondent/writ petitioner alone were according to the specifications and remaining books were not found as per the specifications.

This is the sum and substance of the controversy. We have not purposely referred the further details and the nature of controversy between the parties.

The respondent/writ petitioner raised a preliminary objection as to the maintainability of the writ petition on the ground that the dispute between the appellant and the respondent arises out of a pure concluded commercial contract and the contract itself provides the Forum for resolution of the disputes.

The learned single Judge, having over-ruled the objection, allowed the writ petition holding that “there never existed any basis for the respondent to invoke Clause 11 of the contract and to pass the impugned order and that the action of the respondent is arbitrary, unreasonable and opposed to the concept of proportionality.”

Sri E.Manoher, learned senior counsel appearing on behalf of the appellant-Corporation submitted that the writ petition filed by the respondent/writ petitioner is not maintainable in law. That a writ petition does not lie to resolve the disputes arising out of a concluded commercial contract and more so where the parties have agreed to resolve the disputes by way of arbitration. It is not even a case involving enforcement of any contractual obligations but a case requiring this Court to resolve the dispute under Public Law remedy. Learned senior counsel relied upon the well-known decisions of the Supreme Court reported in ***State of U.P v. Bridge and Roof Company (India) Ltd*** and ***Asst. Excise Commissioner v. Issac Peter*** in support of his submission.

Sri T.Anantha Babu, learned senior counsel appearing on behalf of the respondent/writ petitioner contended that the imposition of penalty as a counter blast to the suit filed by the writ petitioner cannot be countenanced by this Court. The appellant-Corporation is an instrumentality of the State and its actions are required to be fair, just and reasonable even in a matter of contract. That whenever an instrumentality of the State acts unfairly and unjustly even in its contractual obligations, it really acts contrary to the rights guaranteed under Article 14 of the Constitution of India. The submission was, once an instrumentality of the State is a party to the contract, it is an obligation on it, in law, to act fairly and justly.

That a Bench consisting of three learned Judges of the Supreme Court in ***Asst. Excise Commissioner's*** case
(2 supra) held that "in case of contracts freely entered into with the State, there is no room for invoking the doctrine of fairness and reasonableness against one party to the contract (State) for the purpose of altering or adding to the terms and conditions of the contract, merely because it happens to be the State. In such cases, the mutual rights and liabilities of the parties are governed by the terms of the contracts and the laws relating to contracts. It must be remembered that those contracts are entered into pursuant to public auction, floating of tenders or by negotiation. There is no compulsion on any one to enter into these contracts. It is voluntary on both sides. There can be no question of the State power being involved in such contracts."

In ***Bridge and Roof Company's*** case (1 supra) the Supreme Court observed that "Firstly, the contract between the parties is a contract in the realm of private law. It is not a statutory contract. It is governed by the provisions of the Contract Act or, may be, also by certain provisions of the Sale of Goods Act. Any dispute relating to interpretation of the terms and conditions of such a Contract cannot be agitated, and could not have been agitated, in a writ petition. That is a matter either for arbitration as provided by the contract or for Civil Court, as the case may be. Whether any amount is due to the respondent from

the appellant-Government under the contract and, if so, how much and the further question whether retention or refusal to pay any amount by the Government is justified, or not, are all matters which cannot be agitated in or adjudicated upon in a writ petition. The prayer in the writ petition, viz., to restrain the Government from deducting particular amount from the writ petitioner's bill(s) was not a prayer which could be granted by the High Court under Article 226, Indeed, the High Court has not granted the said prayer."

In ***ABL International Ltd v. Export Credit Guarantee Corporation of India Ltd*** the Apex Court, having reviewed the entire law on the subject and adverting to the question held that "on a given set of facts if "the State" acts in an arbitrary manner even in a matter of contract, an aggrieved party can approach the court by way of writ under Art. 226 of the Constitution of India and the Court, depending on facts of the said case is empowered to grant the relief."

It is observed:

From the above discussion of ours, the following legal principles emerge as to the maintainability of a writ petition.

(a) In an appropriate case, a writ petition as against a State or an instrumentality of a State arising out of a contractual obligation is maintainable.

(b) Merely because some disputed questions of fact arise for consideration, same cannot be a ground to refuse to entertain a writ petition in all cases as a matter of rule.

(c) A writ petition involving a consequential relief of monetary claim is also maintainable.

The said Judgment, in our opinion, in no manner supports the contention

of the respondent/writ petitioner that in contractual matters, the remedy under Art. 226 of the Constitution of India is always available even if the contract itself provides a mode for settlement of disputes arising from the contract.

In ***Bridge & Roof Company's*** case (1 supra) the Supreme Court held "further, the contract in question contains a clause providing *inter alia* for settlement of disputes by reference to arbitration. The arbitrators can decide both questions of fact as well as questions of law. When the contract itself provides for a mode of settlement of disputes arising from the contract, there is no reason why the parties should not follow and adopt that remedy and invoke the extraordinary jurisdiction of the High Court under Article 226. The existence of an effective alternative remedy – in this case, provided in the contract itself – is a good ground for the court to decline to exercise its extrarordinary jurisdiction under Article 226.

In ***ABL International Ltd's*** case (3 supra) the Apex Court after referring to the said paragraph in the Judgment in ***Bridge and Roof Company's*** case (1 supra) observed that:

> "It is seen from the above extract that in that case because of an arbitration clause in the contract, the Court refused to invoke the remedy under Article 226 of the Constitution. We have specifically inquired from the parties to the present appeal before us and we have been told that there is no such arbitration clause in the contract in question. <u>It is well known that if the parties to a dispute had agreed to settle their dispute by arbitration and if there is an agreement in that regard, the courts will not permit recourse to any other remedy without invoking the remedy by way of arbitration, unless of course both the parties to the dispute agree on another mode of dispute resolution.</u> (Emphasis supplied)

In the instant case the terms and conditions of the Tender *inter alia* provide that "if any dispute or difference as to the rights on liabilities and obligations of the parties hereto arises during continuance of the contract or thereafter, such dispute or difference shall be referred for the Arbitration to the Managing Director of the Corporation at Lucknow who may settle or decide

such dispute of difference or make any award himself or refer it to his nominee, who shall ordinarily be an officer of the Corporation not below the rank of General manager and thereupon the settlement or decision or Award thus made by the Arbitrator shall be final and binding on both the parties."

Sri T.Anantha Babu, learned senior counsel made an attempt to contend that the arbitration clause is not applicable, since the same is not incorporated in the purchase order dated 5-11-1997. The submission is totally untenable and unsustainable. The purchase order is integrally connected to and intertwined with the terms and conditions of the Tender. The negotiations that resulted in the concluded contract between the appellant-Corporation and the respondent/writ petitioner itself was in consequence of submission of tender by the writ petitioner in response to the tender invitation from the appellant-Corporation. The petitioner itself stated in its affidavit filed in support of the writ petition in so many words and it would be apposite to have a look at the same.

> "While so, in September, 1997, the respondent herein invited fresh tenders for printing 72,00,000 blank ticket books and 1,05,300 way bills. The petitioner vide its letter dated 20-9-1997 offered to supply the above said quantity of blank ticket books and way bills. It furnished two demand drafts issued by the Canara Bank, abids Branch, Hyderabad for a sum of Rs.98,000/- and Rs.28,080/- towards EMD for blank ticket books and way bills respectively. On 29-9-1997 the petitioner was called for negotiations and agreed to reduce its quoted rates. The respondent accepted the revised tenders of the petitioner."

The negotiations between the appellant-Corporation and the respondent company took place pursuant to the offer made by the respondent company in response to the fresh tenders invited in September, 1997 by the appellant-Corporation. The tenders invited in September, 1997 followed by the negotiations resulting in placing the purchase order dated 5-11-1997 are so intertwined and cannot be treated as separate and distinct acts. The terms and conditions of the tender shall continue to apply and operate and therefore any

dispute or difference as to the rights and liabilities and obligations of the parties that may arise during the continuance of the contract and thereafter are required to be referred to arbitration. The parties have agreed to settle their disputes by arbitration. The respondent/writ petitioner submitted quotations for printing and supply of blank ticket books in response to the tender Form No. I dated 23-9-1997. It is bound by the terms of the tender which is in the nature of an agreement. Therefore, the parties cannot be permitted to the recourse to any other remedy without invoking the remedy by way of arbitration.

The remedy under Article 226 f the Constitution of India may be available to enforce the contractual obligations of a State or its instrumentality depending on the facts of each case but the Public Law remedy is not available to annul or modify or whittle down the clauses in the agreement. The remedy lies elsewhere.

We have already referred the facts in brief leading to filing of the writ petition and the nature of controversy. The respondent/writ petitioner himself filed the writ petition seeking recovery of certain amounts from the appellant-Corporation. We have also noted that the Corporation in categorical terms states that the writ petitioner has not fulfilled its contractual obligations and a lot of 2 lakhs blank ticket books supplied by it found to be defective. On inspection only 404 blank ticket books were found to be correct and remaining 1,99,596 books were returned for not being as per the specifications. On what basis and material this issue can be resolved in a summary proceeding under Art. 226 of the Constitution of India? Clause 11 of the purchase order provides that "<u>if any error is noticed in the measurement, cutting and numbering of Blank Ticket the corporation shall be empowered to recover 10 times of the specified rate of printing as penalty from the payable amount. Even after this there is no improvement the penalty may further be increased.</u>" Whether there was any error in the measurement, cutting and numbering of Blank Ticket is a question which is required to be gone into before any relief could be granted to the respondent/writ petitioner. Such complex disputed questions of fact cannot satisfactorily be resolved in a proceeding under Art. 226 of the Constitution of India. It is not as if in appropriate cases, the Court has no jurisdiction to entertain the writ petition involving disputed questions of fact and there is

absolutely a bar for entertaining the writ petition. The question is one of exercise of discretion and not of any lack of jurisdiction. This Court will not normally exercise its jurisdiction where number of complex nature of facts and disputes are involved, which may for their determination require evidence to be let in by the parties to the dispute.

Having regard to the complex nature of facts and the nature of disputes between the parties and having regard to the agreement between the parties to resolve the disputes by referring the same to the Arbitrator, we hold that it is not a fit case for interference by this Court in exercise of its jurisdiction under Art. 226 of the Constitution of India. No relief could be granted to the writ petitioner.

For the aforesaid reasons, the writ appeal is allowed. The judgment under appeal is accordingly set aside. There shall be no order as to costs.

This order shall not preclude the respondent/writ petitioner to avail such remedies as may be available to it in which event the same may have to be disposed of uninfluenced by the observations if any made in this order.

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B. Sudershan Reddy, J.

Dated July, 2004

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Ghulam Mohammed, J.

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